STATE OF WISCONSIN
SUPREME COURT

ASCARIS MAYO and ANTONIO MAYO,

Plaintiffs-Respondents-Cross-Appellants,

UNITED HEALTHCARE INSURANCE COMPANY AND WISCONSIN STATE DEPARTMENT OF HEALTH SERVICES,

Involuntary-Plaintiffs,

v.

WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

Defendant-Appellant-Cross-Respondent-Petitioner,

PROASSURANCE WISCONSIN INSURANCE COMPANY, WYATT JAFFE, MD, DONALD C. GIBSON, INFINITY HEALTHCARE, INC. AND MEDICAL COLLEGE OF WISCONSIN AFFILIATED HOSPITALS, INC.,

Defendants.

Appeal Number
2014AP002812

Circuit Court Case No.
2012CV6272

Three Judge Appeal

APPEAL OF THE FINAL ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. CONEN, PRESIDING

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS' BRIEF

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SUMMARY OF ARGUMENT

The appellate court's well-reasoned decision concluded that Wis. Stats. §§655.017 and 893.55(4)'s cap on noneconomic damages is unconstitutional, facially and as applied, because without any rational basis it deprives only the most severely injured victims of medical malpractice of their full award, contravening the legislative goal to compensate victims. The jury's noneconomic damage award to Ascaris and Antonio Mayo was neither excessive nor unpredictable given her catastrophic injuries but the cap would deprive them of 95.46% of the award.

The Wisconsin Injured Patients and Families Compensation Fund seeks reversal, incorrectly contending that the cap is "an integral part of a comprehensive and carefully balanced system… to ensure … quality health care in Wisconsin…." Wisconsin's system is not balanced, as the Fund's inability to curb its nearly $1 billion surplus over sums reserved for estimated claims demonstrates. (2016 Audit Report ("2016AR") at 10;P.App.759). [1]

No cap was part of the balance when the legislature enacted ch. 655 in 1975, though it contemplated one if the Fund's assets fell too low. They didn't. Instead, the Fund

[1] The Mayos join Fund's requests to take judicial notice. The Fund's 2016 Functional and Progress Report ("2016FAPR") shows a "net balance" (surplus) of $878.8 million as of 6/30/16, up $145 million from 2015. (P.App.176, 179).

grossly overestimated potential claims, creating its massive surplus.

No cap is needed, as the Legislative Audit Bureau's switch from ensuring the Fund's viability to reducing its surplus to a "reasonable" maximum demonstrates. (See 2016AR:10;P.App.759). Those efforts were unsuccessful. The surplus now exceeds its target maximum by $502.2 million. While the Fund falsely asserts that claims' severity is increasing, its reports document the contrary: For the past 5 years, it averaged only **three** claims paid per year but twice, monies reverting to the Fund exceeded payments, resulting in negative annual payments. (2016FAPR:4-5;P.App.168-169). The reports expressly admit its surplus increased over $600 million since 2011 because of decreased losses and increased investment income. (2016FAPR:12;P.App.176). There is no financial jeopardy and no need for a cap.

This massive surplus demonstrates unequivocally that a cap is not rationally related to the legislative goals. The appellate court, properly applying well-settled Wisconsin law, concluded no such basis existed. The few claims paid each year cannot rationally be expected to reduce Wisconsin healthcare costs. Nor can the cap rationally impact the cited physician conduct. There is no logical reason the cap on noneconomic damages would impact such decisions when economic damages are unlimited, particularly because providers are relieved of any personal liability.

While obviously counter to the legislative goal of adequately compensating victims, the cap also invidiously threatens the integrity of Wisconsin's jury system because it is based on distrust of juries. A statute threatening the jury system enshrined in Wisconsin's constitution, based on false premises and irrational fears, has no rational basis. The appellate court's decision should be affirmed.

STATEMENT OF THE ISSUES

1. In an equal protection/due process challenge, the Wisconsin constitution requires only that a statute creating a classification be rationally related to a valid legislative objective. *State v. Jorgensen*, 2003 WI 105, ¶32, 264 Wis.2d 157, 667 N.W.2d 318. Where a cap on noneconomic damages, founded on distrust of juries, deprives only the most seriously injured victims of medical malpractice of properly-awarded noneconomic damages but does not lower health care costs or medical malpractice premiums, promote physician retention or adequate compensation of victims, or affect the financial viability of the Fund, is that cap facially unconstitutional as violating injured patients' rights to equal protection and due process?

Answered by court of appeals: Yes.

Answered by trial court: No**.**

2. When a statute, applied as written, creates a deprivation of private rights which outweighs the public interest because, in its application to the specific facts, it has no rational relationship to the stated legislative goals, the

statute is unconstitutional as applied. *Society Ins. v. LIRC*, 2010 WI 68, ¶30, 326 Wis.2d 444, 786 N.W.2d 385. Where no one contended that the jury's award was excessive or unpredictable but the cap deprived the Mayos of 95.46% of their damages even as the Fund's net position more than doubled, while less injured victims suffered much less or no deprivation, was the cap unconstitutional as applied to the Mayos?

Answered by appellate court: Yes.

Answered by trial court: Yes.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Objection to Fund's "Facts."

The Fund omits any mention of the injuries suffered by the Mayos, while it "spins" certain factual contentions, contrary to *Arents v. ANR Pipeline Co*., 2005 WI App 61, ¶5 n.2, 281 Wis.2d 173, 696 N.W.2d 194.

B. Injuries to Ascaris Mayo

Ascaris and Antonio Mayo met in college. (R253:167, 173).[2] Mrs. Mayo was a music major, studying voice. (R257:5). Music was so important to her, she taught herself to play the flute so she could join her high school orchestra. (R257:5). She also played piano, oboe, guitar, drums, violin, and cello, and could play the harp and organ a little, too. (R253:173; R257:5). After leaving college, she sang in and

[2] Excerpts of the Mayos' testimony are at R.App.101-141.

directed church choirs (she was State Director of her church's choir). (R257:5-6).

She was athletic, a runner who played tennis and golf, and rode and jumped horses. (R.253:174).

After marrying, they adopted four brothers. (R253:168-170). They wanted their sons to have college educations, too; at trial, the sons were in or preparing for post-secondary education. (R253:176-177, 180). Mrs. Mayo returned to school as her sons grew up, partly for her then-job and partly to show her sons "what determination looked like." (R.253:10-12). In May, 2011, she was a UWM senior readying for graduation. (R527:10-12).

That month, Ascaris Mayo, age 50, saw Donald Gibson, P.A., and Dr. Wyatt Jaffe in the E.R. for abdominal pain and high fever. (R253:178-179, 181, 184; R257:33). Although infection was in their differential diagnosis, they failed to advise her about it or the availability of antibiotics. (R246:13-14, 34-36). Instead, they told her to follow up with her gynecologist for her history of fibroids. *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2017 WI App 52, ¶2, 377 Wis.2d 566, 901 N.W.2d 782. Her sepsis went unchecked, resulting in a "medical tsunami" making nearly every organ fail and causing dry gangrene in her extremities. (R94:58; R253:11, 200-208).

Comatose about a month, she required a tracheostomy. (R253:202; 257:5-6). While antibiotics cured her infection, gangrene caused her extremities to "mummify," turning them

hard, brittle, and black. (R253:204). Her first memory was participating in the decision to amputate three extremities. (R253:208, 211-12; 257:4). Afterwards, her pain was "10/10." (R253:211). Dressing changes were painful; even touching hurt. (R253:209).

Her physicians tried to save her remaining hand, but nine days after her triple amputations, she had to participate in the decision to amputate it, too. (R253:207, 212-213).

Long before her ailment, the Mayos agreed to do everything possible to save each other in such circumstances. (253:210-11;R.App.108-09). Mr. Mayo, and St. Joseph's Hospital, did just that because:

> our life, our family would be nothing without her, and I told the doctors time after time when they would come in there and tell me that she have 24 to 48 hours to live, I said I -- I understand that her feet and hands are going to be amputated but I need my wife at home. My family doesn't work without that.

(R253:211;R.App.109). When awakened to give permission for the amputations, Mrs. Mayo told her husband he could divorce her as he had "not signed up for that," but he said:

> Absolutely not. I said we are in it for the long haul. We're going to do whatever we need to do to get you home.

(R.253:211-12; R.App.109-110). He got her home. (R.253:212;R.App.110).

Dr. David Del Toro, a physical medicine and rehabilitation physician at Froedert and Medical College of Wisconsin, oversaw Mrs. Mayo's rehabilitation, for which,

because of her 4 amputations, she had to wait longer than normal. (R253: 5, 12, 19-20). Goals included pain management, training family to wrap her stumps (to help with pain control and using artificial limbs later) and teaching her activities of daily living. (R253:13). Rehabilitation was extremely painful and was more difficult because transportation could be "a major ordeal for her." (R253:18, 28-29).

He explained that, as a four-limb amputee, Mrs. Mayo is more likely to have phantom limb pain indefinitely: "[S]omeone with four amputations, it's hard to—for the brain to process all that information and not generate some idea that the phantom limb is still there somewhere." (R253:16). For the same reason, numbness is likely to occur "in one of the limbs, if not multiple limbs." (Id.)

Because Mrs. Mayo lost both arms:

> there's the obvious physical fatigue [with prostheses] but there is a certain amount of mental fatigue as well because certain tasks that we sort of take for granted, grabbing a tissue paper, blowing our nose, it can be a monumental task for them to do with amputations of both arms, whether they're using a myoelectric arm or they're using body powered or one of each.

(R253:26). Her fatigue was not simply four times greater than a single amputee's but instead a geometric progression. (R253:29). It was more difficult because "she had to learn how to use four prostheses and not just one." (R253:30). A

bilateral amputee has to think about what she is doing for every movement; it is not second nature. (R253:26).

Mrs. Mayo took months to learn how to use her leg prostheses because of the number of amputations and difficulty fitting them. (R253:27). They do not fit right, causing discomfort, and she has a "pebble effect" (constantly feeling like there's a pebble in her shoe), about which nothing can be done. (R253:30, 32-33; R257:13).

The prostheses make her sweat profusely, requiring they be removed and dried, so she cannot use them as hoped. (R253:30-31). Her residual limbs intermittently swell, making it harder to wear prostheses for long periods. (R253:31). Typically, patients with one amputation can wear one 16 hours a day, but Mrs. Mayo can wear them only 8, and then only in an interrupted fashion. (R253:31-32).

Her prosthetic arms are loose and don't stay on when she starts sweating. (R257:14). They "don't come anywhere near what a natural hand does." (R257:15).

Mrs. Mayo is in continual pain, requiring oxycodone and gabapentin daily for residual limb pain and persistent phantom pain. (R253:33). It only suppresses the pain. (Id.) She has tried to wean down to a lower dose but cannot tolerate the pain. (Id.) Although her medication causes drowsiness, she cannot sleep through the night. (R253:34-35). All of her extremities experience "surging numbness" that wakes her up every hour or two. (R257:19).

Mrs. Mayo cannot be left alone because, in an emergency, she cannot open the door to escape. (R253:220-221). She requires "24/7" care. (R253:38). When home, their sons help. (R257:21-22; R. 253:21-22). Her mother lives with them but no longer provides much help because of back and rotator cuff pain. (R257:21). Mr. Mayo takes care of her and their home after work. (R253:214-224).

Mrs. Mayo can no longer play instruments or do athletics. Her voice different since the tracheostomy, she no longer sings. (R257:5-6). Because people stare and ask questions, she is uncomfortable even at her church, so she seldom goes out. (R257:6-7). She cannot scratch an itch or remove things stuck in her teeth or eyes. (R257:26). She cannot pick up flat things, use phones, put on makeup, comb her hair, or clean herself after using the bathroom even if wearing her prosthetics. (R257:14, 25-26, 27).

Dr. Del Toro testified that Mrs. Mayo:

> has some of the – the most amazing spirit that I've ever met. She's got incredible courage and perseverance, all that she's been through since I've seen her in the intensive care unit, and what she's been through and also how far she's come and yet still fighting to be as independent as possible takes a very special person.

(R253:35). Mr. Mayo testified:

> Q Do you still love her?
>
> A Yes. I would always love her. It doesn't matter how she -- she appears to look to other people. I always love my wife.

Q Is Caurie going to make it?

A Caurie is going to make it.

Q I apologize for asking you this, but are you and Caurie intimate?

A I am -- The best way to answer this, I am in love with my wife and when she's ready, she'll tell me. It's not important to me as long as she get the help that she needs, that is all I care, and that she just continue to want to strive for her sons and myself. That's the last thing on my mind. I want her to succeed for whatever she can do. I know she can. I never -- I never told her that -- I don't believe that she can -- her mind is strong. My wife mind is so very strong, but I do not believe that she can -- her body won't do it for her. She's in too much pain. The prostheses are not right. We see other people that have prostheses and they can dance like on Dancing with the Stars. We look at YouTube videos that people can actually walk around. I don't know why they're not working for my wife.

(R253:231-232;R.App.112-113).

Mrs. Mayo has a normal life expectancy. (R253:39).

C. The Fund

Enacted in 1975 to remedy a perceived medical malpractice "crisis," ch. 655 requires providers to purchase primary medical malpractice liability insurance and pay yearly assessments to the Fund, which pays all sums exceeding the primary limits. *Wisconsin Med. Soc'y Inc. v. Morgan,* 2010 WI 94, ¶¶9-14, 328 Wis.2d 469, 787 N.W.2d 22. Investment of Fund reserves created roughly 33 percent of

its total revenue from its inception in 1975 to June of 2004. *Id*., ¶20.

Section §655.27(6) in 2003 created a constitutionally-protected property interest for "proper claimants" like the Mayos, providing:

> The fund is established to curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims and **to ensure that proper claims are satisfied**. The fund, including any net worth of the Fund, is held in irrevocable trust for the sole benefit of health care providers participating in the Fund **and proper claimants**….

(Emphasis added). *Morgan*¸ 328 Wis.2d 469, ¶¶70-78.

As of June 30, 2016, the Fund's assets exceeded $1.3 billion. (2016FAPR:13;P.App.177). Its surplus exceeded $878.8 million. (2016FAPR:15;P.App.179). The Fund attributes the huge increase in its surplus to "an increase in investment income, decreases in loss and LAE liabilities, as well as a decrease in the amount of losses paid." (2016FAPR:12;P.App.176). Fiscal year ("FY") 2016 investment income exceeded $72 million. (2016FAPR:15;P.App.179).

"Since its inception, the Fund has generally taken in more income in the form of health care provider assessments and investment income than it has paid out in claims and other expenses." *Morgan*, ¶23. Its overestimation of claims continues; in 2013, its actuary described its "consistent reserve reductions . . . in the last several years" as

"noteworthy." (R104:116; see 2016FAPR:23;P.App.187 for 2014-16 reductions).

From inception to December 31, 2016, the Fund has paid on about 11% of claims.[3] (P.App.168). In FY2011-12 and FY2015-16, total claim payments were *negative* because approximately $2.5 million reverted to the Fund, exceeding claim payments. (2016FAPR:5;P.App.169). Thus, the Fund's cumulative claim payments, $861,026,275, in 2016 were less than the 2015 total cited by *Mayo*, ¶26,n.10.

Rather than its report, the Fund cites *Morgan*, ¶21, to contend "the severity of Fund claims has been steadily increasing." (Brief at 9). *Morgan* there specifically referenced 2006-2010. After 2009, payments substantially *decreased*, averaging $8.4 million from 2010-2016—about one-third of the $25.7 million average (1997-2006) *Morgan* discussed (¶21, n.9), even without considering inflation. (2016FAPR:5, P.App169).

Claims also decreased. The Fund paid an average of 3 per year, 2011-2016. (Id.) The Fund's contention that claims are "unpredictable" is misleading. Claims have significantly decreased since their peak of 246 in 2000. (R.App.148(Table 4)). Moreover, the 83 claims filed in 2014 included 32 suits against one physician alleging sexual abuse the Fund doesn't cover. (R.App.149-150).

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[3] It has paid on 670 of 6090 claims, closing 5290 without payment. (2016FAPR:5;P.App.169).

Suits are decreasing, too, from a high of 240 medical malpractice cases in 2004 to 87 in 2016. (P.App.190-202). They decreased from 0.004% of all civil filings in 2004 to 0.002% last year. (P.App.190-202).

D. The Cap.

1. History of caps and claims.

Chapter 655 as enacted did not include a cap, but contemplated one if the Fund's assets were in jeopardy. *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶146, 284 Wis.2d 573, 701 N.W.2d 440. That never happened. *Id.* However, though the Fund had no cash flow issues, in 1986 the legislature enacted a $1 million cap on noneconomic damages that "sunset" in 1991. *Id.*, ¶¶147-148.

There is no evidence that sunset caused insurance rates and health care costs to rise, as the Fund claims (citing *Maurin v. Hall*, 2004 WI 100, ¶65, n.7, 274 Wis.2d 28, 682 N.W.2d 866, overruled on other grounds, *Bartholomew v. Wisconsin Patients Comp. Fund*, 2006 WI 91, 293 Wis.2d 38, 717 N.W.2d 216). *Maurin* states only that the health care community "exerted pressure on the legislature" to reinstate caps, such as doctors lamenting rising costs. *Id*. *Ferdon* found no evidence a cap impacted such issues. 284 Wis.2d 573, ¶¶113-165.

Ferdon declared the cap enacted in 1995 unconstitutional in 2005. The Fund contends assessments "almost immediately" rose 25%, attributing that to *Ferdon*.

(Brief at 11, citing *Morgan*, 328 Wis.2d 469, ¶22). If correct,[4] the Fund's data indicates it over-reacted. While there was a two-year spike (2008 and 2009), payments significantly decreased thereafter (2016FAPR:5;P.App.169) though this period necessarily included uncapped claims. See *Morgan*, ¶21, n.8 (claims can pend for 20 years).

Fund policy requires its board to maintain its "net balance" "as close to zero as possible." *Id*., ¶22; see also §655.27(3)(br). Yet the Fund's surplus exceeded $94 million in 2007, *id*., ¶23, though it had lowered providers' assessments. (R99, Ex.4g; R.App.385). That surplus returned when the Fund the legislative fund transfer was reversed. (2106FAPR:12;P.App.176).

By March, 2013, the Fund's surplus was so large its focus was shifted to managing the surplus and fixing parameters for "reasonableness," setting its target maximum surplus at $376.6 million. (R94, Ex.4e (Report 13-4:6, 19; R.App.388-389); 2016AR:9-10; P.App.758-759). Nonetheless, the surplus has continued to increase, rising to $878.8 million ($502.2 million above the target maximum), though the Fund actively attempted to curb it by significantly reducing physician assessments. (Id.; see also 2016FAPR:12;P.App.176).

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[4] See R99, Ex4g (R.App.385), a November 2007 Underwriting & Actuarial Committee report stating that "in recent years," the Fund deliberately grossly undercharged providers in order to reduce its surplus.

While the Fund's surplus grew, *Morgan* protected its assets from invasion and claims and payments fell (R164:40, 56, 59; 2016FAPR:5;P.App.169).

The prior cap automatically adjusted annually for inflation and would have been $547,800 at the end of June 2014. (R175). The $750,000 cap (which does not adjust for inflation) was worth about $641,000, in comparison to its value when enacted, when the verdict returned.[5]

2. Enactment of this cap.

When enacting this cap in 2005Wis. Act 183, the legislature set forth numerous objectives. §893.55(1d). The Fund incorrectly characterizes this as "extraordinary;" many statutes include such statements. See, e.g., *Funk v. Wollin Silo & Equipment, Inc.*, 148 Wis.2d 59, 435 N.W.2d 244 (1989); *Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health & Soc. Servs.,* 130 Wis.2d 79, 387 N.W.2d 254 (1986).

Despite *Ferdon's* analysis, the legislature relied on articles, nearly all predating *Ferdon*, discussing already-old or anecdotal evidence from high-litigation states and decrying "the runaway litigation system" while citing the "absence of reliable national sources of data" and admitting that most malpractice does not result in a claim. (See, §893.55(1d)(a) and R99; P.App284-285, 311-357, 416-444, 451-452). It also

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[5] The CPI rose from 201.8 in 2006 to 236.1 in March 2015. See, Table 24, Historical Consumer Price Index for All Urban Consumers http://www.bls.gov/cpi/cpid1503.pdf. $641,000/750,000 =201.8/236.1.

cited a 2001 audit bureau report which specifically declared Wisconsin data insufficient to determine the cap's effect on retention or premiums. §893.55(1d)(a)1-4 and R.99, P.App.558.

Further facts are in the body of the brief.

II. PROCEDURAL STATUS AND DISPOSITION

The Fund again omits the circuit court's factual findings. (Brief at 6, Appellant's Brief at 5). That court explained the tests for equal protection and due process challenges. (R191:15-21; P.App.058-064). The jury's liability verdict created a constitutionally-protected property interest. *Morgan*, ¶¶70-78 (R191:16; P.App.059). The cap would reduce the noneconomic damages awarded by over 95%. (Id.) The court declared:

> . . .there is no rational justification for depriving Mrs. Mayo, who is in her mid-fifties, limbless and largely immobile, and Mr. Mayo of the award the jury decided was appropriate to compensate them... The Cap is meant to promote affordable and accessible health care in Wisconsin, but it is also meant to ensure that medical malpractice victims are adequately compensated.

(Id.) Given the "severity of Mrs. Mayo's life-altering injuries," application of the cap would be contrary to the legislative goals because the Mayos would be only "minimally compensated." (R191:17; P.App.060).

The court concluded the cap had no rational relationship to the other legislative goals on these facts. The Fund was then valued at $1.08 billion; payment of this award

would not affect its profitability. (Id.) The Fund's investment income (more than sufficient to pay this award),[6] the fact that payment would not raise premiums or health care costs, and that the number of claims is declining, demonstrated that payment would not affect the Fund's viability, in turn demonstrating the cap was not rationally related to its stated purpose. (R191:18;P.App.061).

Reducing "defensive medicine" was not rationally related because providing Mrs. Mayo with antibiotics "would not have been 'defensive,' but rather a reasonable response to her symptoms." (R191:19;P.App.062). The award, while large, was "dwarfed by the wealth of the Fund," obviating concerns regarding insolvency. (Id.) It was "unreasonable to assert that a $16.5 million award to the Plaintiffs in this particular case was unpredictable" because "no one could seriously argue that it is not in proportion to Mrs. Mayo's injuries. Mrs. Mayo lost all of her limbs..." (Id.) No one so argued. (Id.)

The court compared Mrs. Mayo's circumstances with those of Matthew Ferdon:

> The plaintiff in *Ferdon* was an infant when he lost partial use of his right arm. Mrs. Mayo is a middle-aged, married mother of four who lost all of her limbs and consequently, the ability to work and to care for herself and her family. The factual differences between *Ferdon* and this case illustrate the classifications that the Cap creates and highlight

[6] 2016 investment income (>$72 million) exceeded its highest annual payout ($65.7 million). (Compare 2016FAPR:5,15;P.App.169, 179).

> the unconstitutional disparity in treatment of these severely injured Plaintiffs.

(R191:20; P.App.063). Further, the cap was "worth much less in 2014" than when enacted. (Id.) Given this reduced value and the 95.46% reduction in the noneconomic damages, the court concluded the deprivation was unconstitutional. (Id.)

Application was also unconstitutional because the loss of Mrs. Mayo's limbs and Mr. Mayo's "married life as he... knows it" resulted in an unconstitutional disparity of treatment "in hopes of marginally improving health care in Wisconsin." (R191:20-21; P.App.062-63).

ARGUMENT

I. STANDARDS FOR CONSTITUTIONAL CHALLENGES

Interpretation of the state constitution and statutes are questions of law decided *de novo*, benefiting from the lower court's analysis. *State v. Hamdan*, 2003 WI 113, ¶19, 264 Wis.2d 433, 665 N.W.2d 785. Findings of historical or evidentiary fact are upheld unless clearly erroneous. *Chappy v. LIRC*, 136 Wis.2d 172, 184, 401 N.W.2d 568 (1987).

The court must:

> … presume that the statute is constitutional and indulge "every presumption to sustain the law if at all possible...." . . . The burden is on the party challenging the statute to prove that the statute is unconstitutional beyond a reasonable doubt. . . Any doubt must be resolved in favor of the constitutionality of the statute.

Nankin v. Village of Shorewood, 2001 WI 92, ¶10, 245 Wis.2d 86, 630 N.W.2d 141 (internal quotation omitted).

> Nevertheless, when legislation is challenged, the justices of this court deem it their unavoidable burden under the constitution to examine such legislation and to assess its realistic operation. Although the legislative declarations are entitled to great weight, we may not blindly accept at full value even the most elaborate prefatory expressions concerning community need, economic impact, or public purpose...

State ex rel. Bowman v. Barczak, 34 Wis.2d 57, 65-66, 148 N.W.2d 683 (1967). "[W]hen a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." *Ferdon*, 284 Wis.2d 573, ¶69. A statute may become constitutionally invalid because of changes in the conditions to which it statute applies because "[a] past crisis does not forever render a law valid." *Id.*, ¶114. See, also, *Hanauer v. Republic Building Co.*, 216 Wis. 49, 58-59, 255 N.W. 136 (1934); *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis.2d 464, 490, 235 N.W.2d 648 (1975) (court obligated to interpret constitutional provisions in "light of present-day conditions…").

The proof required is not evidentiary proof but rather proof that "establishes the force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional." *Appling v. Walker*, 2014 WI 96, ¶18, 358 Wis.2d 132, 853 N.W.2d 888.

There is no doubt: this cap violates the Wisconsin Constitution. This court should affirm.

II. THE LEVEL OF SCRUTINY.

The lower courts applied the rational basis test to both the facial and as-applied challenges, rejecting heightened scrutiny despite the Mayos' constitutionally-protected property interest. *Mayo*, ¶12, n.2. Because the cap cannot pass muster under any test, the Mayos address the rational basis standard.

III. THE CAP IS FACIALLY UNCONSTITUTIONAL.

A. Introduction

> "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.... Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Milwaukee Brewers, 130 Wis.2d at 85, quoting *Railway Express v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring). The cap does exactly what *Milwaukee Brewers* warns against, attempting to resolve a perceived societal problem on the backs of the few, most severely injured, victims of medical malpractice. *Id.*, 130 Wis.2d at 106. Despite Mrs. Mayo's catastrophic permanent injuries, the cap would reduce the jury's noneconomic damages award by over 95%, though no one contends it was excessive, while the Fund's *surplus* burgeons to nearly $1 **billion**.

B. The Cap violates the Mayos' equal protection and due process rights.[7]

1. Legislative fact-finding does not bar constitutional challenges.

The appellate court correctly concluded that there is no rational basis between the cap and the legislative purposes for which it was enacted. That decision should be affirmed.

The Fund's reliance on *Heller v. Doe,* 509 U.S. 312 (1993), is misplaced. Wisconsin courts are obligated to examine legislation and assess "its realistic operation." *Bowman*, 34Wis.2d at 65-66. Thus, striking legislation not rationally related to the legislative rationale or supporting materials, this court declared:

> What the legislature believes is not determinative; the test is not whether the legislature had a rationale. It will always have a rationale for anything it does. The test is whether the rationale is rational. **If the concept of equal protection is to be meaningful, equal protection cannot be interpreted so as to allow the legislature to exercise its will on a minority of citizens anytime it desires so long as there is any rationale to do so, regardless of how remote, fanciful, or speculative the rationale may be.** To be rational for the purpose of equal protection analysis, the legislative rationale must be reasonable. Put another way, "... in application to policies, projects, or acts, RATIONAL implies satisfactory to the reason or chiefly actuated by reason...."

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[7] The Mayos did not forfeit their due process challenge, which they raised below. (R191:13-15;P.App.056-058; *Mayo*, ¶12, n.3). Like the lower courts, however, they do not address it separately because the analysis is so similar. *Id.*

Milwaukee Brewers, 130 Wis.2d at 103-104 (internal quotation omitted) (bolding added).

This court has not hesitated to declare statutes with similar statements unconstitutional when appropriate. See, e.g., *Funk* and *Milwaukee Brewers.* Though entitled to "great weight," "even the most elaborate" legislative findings are not binding on this court. *Bowman*, 34 Wis.2d at 65-66. It is so empowered to check excesses created by the changing makeup of the legislature over time. *State v. Holmes*, 106 Wis.2d 31, 44, 315 N.W.2d 703 (1982).

And because the legislature set forth a rationale, this court need not create one. *Milwaukee Brewers,* 130 Wis.2d at 102; see also *Blake v. Jossart*, 2016 WI 57, ¶32, 370 Wis.2d 1, 884 N.W.2d 484, *cert. denied*, 137 S. Ct. 669 (2017) (court must assume legislature passed act on basis specified where rationale provided). Instead, "[t]he question is whether the articulated rationale… provides a reasonable basis to deny rights…" *Milwaukee Brewers*, 130 Wis.2d at 101. The appellate court correctly concluded it did not.

Likening this cap to those in *Bostco LLC v. Milwaukee Metro. Sewerage Dist*., 2013 WI 78, 350 Wis.2d 554, 835 N.W.2d 160, and *Sambs v. City of Brookfield*, 97 Wis.2d 356, 293 N.W.2d 504 (1980) (Brief at 18, 43), fails because claims against governmental agencies are a "creation of the legislature" not existing at common law; parties' rights are coterminous with the statutory claim. *Id*., ¶77; *Weiss v. Regent Properties, Ltd.*, 118 Wis.2d 225, 230, 346 N.W.2d

766 (1984). Medical malpractice suits are not. And the Fund is not "public funds" but instead the constitutionally-protected property of its beneficiaries, including "proper claimants" like the Mayos. *Morgan*, ¶¶74-78.[8]

Affirmance is required.

2. The Classifications

The appellate court correctly concluded that *Ferdon's* conclusions applied equally here because the only real change was the amount of the cap. *Mayo*, ¶¶19-20, 27-28. Like the prior cap, it created two classifications: medical malpractice victims who suffer noneconomic damages in excess of the cap and those who do not. *Mayo*, ¶¶15, 27-28. Its greatest impact falls on those most severely injured. *Id*. *Ferdon's* observation that victims with families must share their award *Ferdon*, ¶83, is applicable to the Mayos.

3. The Legislature's Objectives

The appellate court correctly concluded the legislative objectives in §893.55(1d) mirror the objectives found in *Ferdon*. *Mayo*, ¶¶16-20. *Ferdon* declared the "primary, overall legislative objective" ensuring "the quality of health care" for citizens; retention of tort liability signaled the legislature's commitment to quality health care. *Ferdon*, ¶¶87-89. The new cap's overall goal remains the same,

[8] Section 655.27(5)(e) applies only if the Fund is exhausted. The Fund's surplus and decreasing claims render its argument regarding public funds too tenuous to merit consideration. *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 511, 261 N.W.2d 434 (1978) (declining to consider issue unable to affect petitioners).

"ensur[ing] affordable and quality health care" and that victims of medical malpractice are adequately compensated. *Mayo*, ¶19. It states it accomplishes those goals by:

> 1. Protecting access to health care services across the state… by limiting the disincentives for physicians to practice medicine in Wisconsin, such as the unavailability of professional liability insurance coverage, the high cost of insurance premiums, large Fund assessments, and unpredictable or large noneconomic damage awards...
>
> 2. Helping contain health care costs by limiting the incentive to practice defensive medicine, which increases the cost of patient care...
>
> 3. Helping contain health care costs by providing more predictability in noneconomic damage awards, allowing insurers to set insurance premiums that better reflect such insurers' financial risk...
>
> 4. Helping contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the Fund and allow the Fund's board of governors to approve reasonable assessments for health care providers...

§893.55(1d)(a). The same objectives were identified in *Ferdon. Mayo*, ¶¶19-20.

However, the legislature failed to address the constitutional infirmities identified by *Ferdon*, rendering *Funk* dispositive.

Funk declared the second version of a statute, like this one accompanied by specific findings and a statement of intent, unconstitutional because: "Although the legislature purported to cure the under-inclusiveness which invalidated the [predecessor] statute… it failed to do so in a meaningful way." *Id*., at 77. It did the same thing here. Despite *Ferdon's* explanation of the cap's deficiencies, including Justice Crooks' declaration that its caps "demonstrated arbitrariness," the legislature again failed to meaningfully address the connection between the cap and its stated goals. *Mayo*, ¶¶17, 26-28, citing *Ferdon*, ¶190 (Crooks, J., concurring).[9] This failure warrants affirmance.

The Fund's argument to the contrary, relying on *Heller*, advocates rubber-stamping of legislative pronouncements. *Bowman*, supra, and *Doering v. WEA Ins. Group*, 193 Wis.2d 118, 132, 532 N.W.2d 432 (1995), require this court to probe further. It must also ensure the ongoing validity of such findings. *Ferdon*, ¶114; *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014). Here, the Fund's surplus alone demonstrates that no reasonable basis exists to support this classification and that no "crisis" warrants a cap today. See, also, *McCall*, at 913. This court should affirm the appellate court's correct conclusion.

[9] This cap did not automatically adjust for inflation. §893.55(4). *Ferdon's* cap did. Because inflation renders the values so similar, it renders *Ferdon* dispositive.

4. No rational relationship exists between the classifications and legislative goals

a. No rational relationship exists between the classifications and fairly compensating victims

The Fund never addresses §893.55(1d)'s legislative goal of "adequate compensation" to victims, nor the circuit court's conclusion that the Mayos would be only "minimally compensated." "Adequate" is undefined; it indicates an intent "to help insure that patients' rights are protected, not to expand or otherwise change the law of negligence." *Erbstoeszer v. Am. Cas. Co.*, 169 Wis.2d 637, 643, 486 N.W.2d 549 (Ct. App. 1992) (defining "adequate treatment"). Caps do not ensure victims' rights are protected or compensation adequate, but instead do "just the opposite," without eliminating non-meritorious claims. *Arneson v. Olson*, 270 N.W.2d 125, 135-136 (N.D. 1978).

> A statute will be held unconstitutional if the statute is shown to be "patently arbitrary" with "no rational relationship to a legitimate government interest."

Ferdon, ¶73 (footnotes omitted). There is no rational relationship between this goal and the cap.

That is no surprise because the legislature relied on a report incorrectly declaring that damages do not compensate pain and suffering.[10] (R99; P.App.229). *Jones v. Fisher*, 42

[10] The same report declared noneconomic damages "infected with emotion" (R.99;P.App.228), contrary to the presumption that jurors follow the court's instructions. *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis.2d 85, 750 N.W.2d 780.

Wis.2d 209, 215-16, 166 N.W.2d 175 (1969), unequivocally declares pain and suffering compensable. See, also, *Bowen v. Lumbermens Mut. Cas. Co*., 183 Wis.2d 627, 638-47, 517 N.W.2d 432 (1994). This declaration is contrary to Wisconsin's policy of providing "full compensation to those who are injured by the negligent conduct of another." *Neiman v. Am. Nat. Prop. & Cas. Co.*, 2000 WI 83, ¶25, 236 Wis.2d 411, 613 N.W.2d 160; and because of its mistrust of juries, threatens the integrity of the jury system. *Jandre v. Wisconsin Injured Patients & Families Comp. Fund*, 2012 WI 39, ¶¶ 29, 156, 340 Wis.2d 31, 813 N.W.2d 627.[11]

It is patently unreasonable for §893.55(1d) to "accomplish" its goal of "adequate compensation" of victims by, contrary to Wisconsin law and policy, protecting physicians and their insurers against "unpredictable" awards of noneconomic damages. It is equally "unreasonable" to contend this award was unpredictable, as the circuit declared, because it was commensurate with the injuries. (R191:19;P.App.062). Most malpractice verdicts are. See, Shirley Svorny, *Could Mandatory Caps on Medical Malpractice Damages Harm Consumers?* Cato Institute, Policy Analysis #685 at 3 (October 20, 2011).

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[11] *Heath v. Zellmer*, 35 Wis.2d 578, 601, 151 N.W.2d 664 (1967), states that denying tort victims compensation may render them "public charges," which also would contravene the legislative goals. *Heath's* quote regarding lobbying, *id*., at 602, resonates strikingly here.

"[T]he assessment of risk and uncertainty is at the very heart of the insurer's business." *Pitts v. Revocable Tr. of Knueppel*, 2005 WI 95, ¶53, 282 Wis.2d 550, 698 N.W.2d 761. Neither legislature nor Fund provides any reason why the Fund cannot competently predict this risk, as other liability insurers do. Its trope that medical malpractice risk is hard to predict due to extended reporting and settlement patterns is untenable because, unlike other torts, the legislature provided a statute of repose, §893.55(1d)(m), and much shorter limitation period for children (compare §§893.56 and 893.16), to provide predictability.

Nor does the Fund show that malpractice victims' noneconomic damages are qualitatively different from other tort victims'. Ironically, it claims that such damages are all "speculative" because they cannot be calculated with mathematical certainty; the Fund demands much more rigor from jurors than legislators.

The legislature's reliance on outdated materials and incorrect statements of law, along with its failure to address "adequate compensation" of victims, demonstrates no attempt to meaningfully address constitutional infirmities. This too shows the lack of rational basis for such disparate treatment. See, *Ferdon*, ¶¶101-103, and *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 689 N.E.2d 1057, 1077 (1997) (cap impermissibly put burden "on one class of injured plaintiffs" without demonstrating any savings in system-wide costs of litigation).

The Florida Supreme Court concluded such caps offend constitutional principles by harming the most injured:

> [T]to reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it "offends the fundamental notion of equal justice under the law."

McCall, 134 So.3d at 903 (internal quotation omitted). The appellate court correctly reached the same conclusion.

The cap's classifications bear no rational basis to the legislature's stated objectives and are thus invalid. *Ferdon*, ¶35. There is no showing that the "classes have different needs, conditions or requirements with respect to the purposes of the legislation such that a statutory classification is justified." *Id*. Rather, the legislature's classification is contrary to §655.27(6) and 893.55(1d) because it deprives victims of compensation. See, *Ferdon*, ¶101-103. Moreover, it undermines the principal goal of ch. 655, ensuring quality health care, because caps increase the risk to patients. *Mayo*, ¶22, n.6; Svorny, *Mandatory Caps*, at 12-13.

The circuit court's comparison of these facts to *Ferdon*'s demonstrates the disparity. Awards to severely injured claimants like Matthew Ferdon are reduced much less than to those catastrophically injured, like Mrs. Mayo. The "legislative objective of ensuring fair compensation" cannot be met with a limitation of $750,000 for all noneconomic damages because this arbitrary amount "creates an undue hardship on a small unfortunate group of plaintiffs." *Ferdon*, ¶103.

A hypothetical highlights the arbitrariness of the cap and its application. Article I, sec. 13, of the Wisconsin Constitution requires "just compensation" for taking property for public use. Assume the legislature made detailed findings that highway construction is essential to the state and, based on its consideration of studies, that $100,000 is "just compensation" for acquisition of any property by eminent domain. If the legislature then declared the public interest required taking a $2 million home, no court could find a reasonable basis for the conclusion that $100,000, just 5% of value, is just or adequate compensation. No reasonable basis exists here either.

Tortfeasors, too, are treated differently, *McCall*, 134 So.3d at 902. While physicians can never be personally liable for an excess judgment, their victims' damages are capped, unlike other tortfeasors'. Given Wisconsin's discomfort with treating tortfeasors differently, see *Disc. Fabric House of Racine, Inc. v. Wisconsin Tel. Co.*, 117 Wis.2d 587, 597-98, 345 N.W.2d 417 (1984), this, too, violates equal protection requirements and lacks rational basis.

b. There is no rational relationship between a cap and physician retention, malpractice premiums or assessments.

The appellate court determined that caps have no demonstrably consistent effect on physician retention[12] and

[12] The Fund apparently misunderstands this conclusion. Contending some states without caps have lower retention rates (Brief at 21), it unintentionally proves the court's point.

thus no rational relationship with it. *Mayo*, ¶21. The Fund disputes this, regurgitating the legislature's declarations without analysis or consideration of changed conditions. (Brief at 19, 24). It ignores that, by creating the Fund as their unlimited excess insurer, ch. 655 eliminates physicians' personal liability (and limits their premium outlays), giving them a "stable legal environment" with or without a cap. It ignores recent studies demonstrating no effect on retention. See, e.g., Patricia H. Born, et al., *The Net Effects of Medical Malpractice Tort Reform on Health Insurance Losses: the Texas Experience*, Health Economics Review (2017) 7:42, p. 14, n.6. (R.App.380; See also R.App.320-350).

Minnesota's significantly better history of physician retention, without increase in healthcare costs and without a cap, further undermines its arguments. (R.94:437-56; R.App.151-158).

A decision to forego practicing here because noneconomic damages are not capped is illogical given that economic losses are unlimited, all the more so because physicians are insulated from personal liability. There must be a **rationa**l basis for the means chosen to accomplish legislative goals. *Milwaukee Brewers*, 130 Wis.2d at 100.

Insurers admit there is no direct correlation between tort reform and premiums. See, *McCall*, 134 So.2d at 910-911; Public Citizen, *Insurance Companies and Their Lobbyists Admit It: Caps on Damages Won't Lower Insurance*

Premiums (collecting comments and testimony) (R.App.163-189).

Empirical studies also refute this contention. *Mayo*, ¶23, see, also R.App.146-189. Premiums have decreased since 2006, even in states without caps, rendering caps an implausible basis for such decreases. (R93:45, 47; R94:460-490). The logical explanation is the decrease in claims and payments. J. Robert Hunter and Joanne Doroshow; *Unstable Losses/Unstable Rates 2016*, p.2 ("both premiums and claims per physician are currently at their lowest level in four decades.") (R.App.191).

Complaints that premiums will rise because primary insurers must defend physicians are also baseless. No facts support an increase. Suits have decreased (P.App.190-202) and insurers' exposure remains unchanged.

Contentions that assessments will increase if the cap is invalidated are equally untenable. As discussed above, there is no evidence that post-*Ferdon* claims merited an increase. The Fund's surplus, along with its years-long record of reducing assessments to curb the surplus (to no avail), (including 30% reductions, 2015 and 2016), eviscerates this contention. (2016AR at 9-10;P.App.758-759).

The Fund's breathless contention that "every malpractice action" will become a "guaranteed-recovery-case" is similarly meritless. The Fund has paid on only 11% of all claims. *Mayo*, ¶ 26. It provides no rational basis to

conclude that invalidation of the cap would magically increase claims or recoveries.

The contention that the cap promotes settlement is without citation to record or authority; neither supports it. In the past 5 years, 15 medical malpractice cases settled; 51 were tried. (R.App. 393). In contrast, 3747 civil cases settled while 637 were tried in 2016. (P.App.202). If caps promoted settlement, the percentages would be reversed.

Analyzing Wisconsin data since *Ferdon* validates its conclusion. Premiums generally peaked around 2002, then began to decline around 2006. (R93:45, 47 and R94:460-490). If caps were effective, premiums should not have risen to their highest level while the lowest cap was in effect.

Retention, premiums and assessments provide no rational basis for the cap.

c. There is no rational relationship to health care costs or "defensive medicine."

Nonpartisan studies have:

> led to a loose consensus among most economists and policy makers that defensive medicine is not an important contributor to U.S. health-care spending—and therefore that malpractice reform is not of much significance for containing costs.

Amitabh Chandra, Anupam B. Jena, and Seth A. Seabury, *Defensive Medicine May Be Costlier Than It Seems,* Wall St. J. A13 (Feb.7, 2013). This conclusion was confirmed in a recent study measuring but finding no correlation between

tort reform and health care costs other than an initial increase in health care costs. Born, *Net Effects* at 12-13 (R.App.378-379). See, also, Paik et al., *Will Tort Reform Bend the Cost Curve? Evidence From Texas*, Journal of Empirical Legal Studies, Vol. 9, Issue 2 at 173 (June 2012); Kevin T. Kavanaugh, et al., *The Relationship Between Tort Reform and Medical Utilizati*on, Journal of Patient Safety (2013) (evidence "did not support the hypothesis that defensive medicine is a significant driver of medical overutilization and rising health-care costs.")

Some "defensive medicine" costs "may be motivated less by liability concerns than by the income it generates for physicians…" *Ferdon*, ¶174. See, also, Government Accounting Office Report to Congressional Requesters, Medicare: *Higher Use of Advanced Imaging Services by Providers Who Self-Refer Costing Medicare Millions*, September 2012; Paik, *supra*, at 195-198, 201, 211.

The cap has not reduced health care costs. Wisconsin's per capita health care spending is similar to Minnesota's and higher than Illinois', although neither has such a cap. (R94:437-456, R.App.155-157; see also Public Citizen, *No Correlation*, August 2013, at 4-5 ("If health care costs followed the trajectory of litigation trends since 2003, our national health care bill in 2012 would have been $1.3 trillion. Instead, it was $2.8 trillion.") (R104:20; R.App.167)).

The mere existence of some unquantifiable "defensive medicine" is not a rational basis for the cap in the absence of

any evidence that a cap would eliminate it. There is no rational basis for depriving severely injured victims of medical malpractice of the bulk of their award in order to continue failing to reduce health care costs.

d. There is no relationship between the cap and the Fund's viability.

Despite its nearly $1billion surplus, the Fund argues at length about its threatened financial viability, citing a 2001 Audit Report discussing previous "financial instability." (Brief at 27). The Fund exaggerates. The cited accounting deficit related only to projected, not actual, claims. (P.App.603). The same report admitted that claims had been significantly overestimated (P.App.608) and that income had exceeded payments, creating assets totaling $542 million by June 2000. (P.App.601). It pooh-poohed that its actuarial estimates were "overly conservative," yet sixteen years later, its assets had grown to $1.3 **billion** and the Audit Bureau no longer consider viability an issue. (P.App.177, 605, 759). The Fund's arguments are beyond the pale.

It predicts its liabilities would increase by $150-$200 million if the cap is invalidated, but omits that doing so would still not decrease its surplus ($878.8 million) even close to its target maximum ($376.6 million), unequivocally demonstrating that no financial jeopardy exists.

The Fund's lengthy history of reducing its loss estimates contradicts its contention that the cap is responsible for its surplus. *Ferdon,* ¶ 140. Like its commercial

counterparts, the Fund overestimated its potential liability, creating the surplus.[13] See Stable Losses, at 12; R.App.201.

The Fund continues to fret about the risk of "mega-awards" (see P.App.606), though there have been none. A New York "mega-award" decried as an "ongoing reality" is not real: remittitur reduced the jury's noneconomic damage award to $6.9 million. (R.App.351-362). The Fund's continued exaggeration of such risks is the reason for its massive surplus. Irrational fears are not a rational basis for legislation.

The Fund's citation to the multiple suits against Dr. Van der Loo is equally misleading. It cites no covered instance of such multiple suits in its 40 years, nor any basis to expect one now. Its sky-is-falling fears are not a rational basis for creation of a cap.

Its other arguments are equally unpersuasive. Asserting that claims are increasing in severity, the Fund cites 2016FAPR:5 (P.App.169), which proves they are not. It worries that invalidation of the cap could decrease physician retention, yet complains about covering more physicians. (Brief at 29). It again argues claims are unpredictable despite studies showing the contrary and special provisions to aid predictability like its statute of repose.

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[13] Demonstrating this, an actuarial committee member in 2007 "pointed out for the last six years he has heard that this would be the year the deficit would hit; but every year there was a positive cash flow." (R94: Ex. 4.g;R.App.385).

The Fund's complaints that the appellate court's discussion of its wealth "flies in the face" of the legislature's findings ignores the court's obligation to examine whether the law, its realistic operation, and changes in circumstances which could render a provision unconstitutional. *Bowman*, 34 Wis.2d at 65-66; *Ferdon*, ¶114. The pattern of decreasing claims and the massive increases in the Fund's surplus are just such changes.

The Fund's other attacks on the appellate court decision fall just as flat. The decision was specifically based on, *inter alia*, the Fund's 40-year record of paying on only 11% of claims and its history of overestimating potential claims, creating the surplus, not a "gut feeling." *Mayo*, ¶¶26-27. The Fund's argument that affirmation will result in the cap's constitutionality being in a state of flux depending on the Fund's financial health also is untenable given the surplus's history of growth (excepting the *Morgan*-reversed transfer, now prohibited). There is no flux.

e. Other rationales are equally unconvincing.

Contrary to *Milwaukee Brewers*, the Fund argues that the court should consider different reasons supporting retention of the cap, essentially rehashing its untenable contention that the cap is an integral part of Wisconsin's medical malpractice system. The Fund's contention that this system "ensures quality and affordable healthcare for all of Wisconsin" (Brief at 31), is untenable given the studies showing that caps increase the risk of harm to patients and

that Wisconsin's healthcare is no more affordable than neighboring states' without such caps. See Svorny, at 12-13; and R.App.151-158.

The Commissioner of Insurance declared: "'[n]o direct correlation can be drawn between the caps enacted in 1995 and current rate changes taking place in the primary market today.'" *Ferdon*, ¶121. The Fund's argument does not refute that conclusion. To the contrary, the Fund's claims about the long tails of malpractice claim indicates that uncapped claims necessarily continued, yet its surplus grew unabated.

The Fund's bid to garner sympathy for providers, asserting that their assessments and resultant investment income alone created its surplus, falls flat, too. It downplays the significance of its investment income (33% of revenue, 1975-2004), often far exceeding assessments. *Morgan*, 328 Wis.2d 469, ¶20, 2016AR:24-25;P.App.773-774 and 2016FAPR:15;P.App.179. Worse, this contention ignores that Mrs. Mayo's injuries were also created solely by Fund providers. Wisconsin requires tortfeasors to fully compensate their victims, not vice-versa.

The Fund implies it always immediately pays proper claimants' economic losses, unlike other tort victims, but it cites no record or authority substantiating this contention. Contrary to its implication, there is no requirement that it forego appeal.

The Fund's new argument that medical malpractice victims should shoulder "a share of the burden" of harm

caused by physicians' negligence also lacks merit. Victims shoulder their share by being injured by providers. Characterizing the cap as a trade-off for payment of economic damages does not hold water: ch. 655 guaranteed payment of all damages before the cap was enacted. Moreover, as discussed above, the cap is based on a report contrary to Wisconsin law and policy. And contrary to the Fund's contention, the Legislature **didn't** "spread the burden among all of those who benefit from the system." (Brief at 32). Only the most severely injured victims are deprived of valid awards. "[W]hen the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational." *Ferdon*, ¶101.

Likening the cap to workers compensation fails because in that system, all workers participate, not just the most injured. This disparity further highlights the profound irrationality of the cap.

The Fund argues that invalidating the cap will force providers to shoulder the entire cost of the system, but "[n]o rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers." *Ferdon*, ¶102. This is particularly true given insurers' 100% profitability (R.App.142-145) and the Fund's surplus. The Legislative Fiscal Bureau correctly predicted in 2003 that the Fund's total assets by 2013 could

be sufficient to pay all claims, even with a static assessment of $31 million a year and a $300 million withdrawal. *Ferdon*, ¶143. There is no rational relationship between the cap and any legislative goals.

IV. THE APPELLATE COURT PROPERLY APPLIED THE RATIONAL BASIS TEST.

The appellate court's decision properly followed *Ferdon's* dispositive analysis when concluding that the cap had no rational basis. *Funk*, 148 Wis.2d at 73-74.

The appellate court did not weigh the fairness of the cap but its rationality, declaring:

> The preamble to the statute did nothing to establish a rational connection between the limit on noneconomic damages selected and the objectives the legislature cited in support of that limit. As we have seen, the cap does nothing to promote the primary purpose of the statute, which is to "ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice." See § 893.55(1d)(a) (emphasis added). … Severely injured medical malpractice claimants are unduly burdened by the cap without a rational basis that supports the legislature's stated objectives in any way.

Mayo, ¶27. The court analyzed each objective in similar detail yet found no evidence the cap was rationally related to any one. *Id.*, ¶¶22-29. The Fund's mischaracterization must be rejected.

Its next salvo is equally meritless. *Treiber v. Knoll*, 135 Wis. 2d 58, 66, 398 N.W.2d 756 (1987), is inapposite because legislatures possess the greatest freedom in classification in taxation, while enjoying a greater presumption on constitutionality. It reliance on *Heller* is misplaced because it is contrary to Wisconsin-specific precedent. As *Funk* explains, where this court has declared a statute unconstitutional, the legislature must meaningfully address the constitutional infirmities identified. It didn't.

Instead, the legislature simply declared this sum just right. But the appellate court correctly observed that it did not explain *why* that sum was just right. *Mayo*, ¶26. No calculations or studies explained why the sum was not arbitrary or linked it to the legislative objectives. The Fund's argument that no mathematical precision is required ignores *Funk* and *Milwaukee Brewers*. Where there is "no rational basis, articulated in the statute or otherwise, to support the means which the legislature chose to accomplish its objective," the statute is unconstitutional. *Milwaukee Brewers*, 130 Wis.2d at 100. No such rational basis exists here.

The Fund's argument that the appellate court impermissibly reweighed the evidence ignores Wisconsin law obligating courts to probe deeper and consider changed conditions. The appellate court met this obligation, considering empirical studies based on hard data regarding the ability to measure defensive medicine and the risk of

harm to patients created by caps, along with data supplied by the Fund's own records, including the number of fund participants, the decrease in claims, malpractice premiums, the Fund surplus's growth, and its 40-year history of claims payments. *Mayo*, ¶¶22-29.

The Fund not only fails to address Wisconsin law imposing such obligations but falsely argues no change has occurred despite its own reports to the contrary. This failure forfeits the right to contest the appellate court's conclusions.

Adopting the Fund's arguments would require this court to reverse decades of authority and rubber-stamp legislative enactments. It is the courts' obligation to do otherwise to protect citizens from governmental overreach. The Fund's argument must be rejected.

V. THE CAP IS UNCONSTITUTIONAL AS APPLIED.

A. The Fund abandoned this issue.

By failing to address the circuit court's factual findings, the Fund abandoned this issue. See, *Chappy, supra,* and *State v. Johnson*, 184 Wis.2d 324, 344–45, 516 N.W.2d 463 (Ct. App.1994). If this court addresses this issue, it should affirm because the Fund has failed to demonstrate any error.

"An as-applied challenge … is a claim that a statute is unconstitutional as it relates to the facts of a particular case or to a particular party." *State v. Pocian*, 2012 WI App 58, 341 Wis.2d 380, ¶6, 814 N.W.2d 894. The court assesses the

merits of an as-applied challenge by considering the facts of the particular case in front of it, "not hypothetical facts in other situations." *Hamdan*, 264 Wis.2d 433, ¶43. The Fund fails to address the specific facts, instead positing only hypotheticals regarding future claimants' arguments. Thus, its arguments must be rejected.

B. The cap is unconstitutional on these facts.

In an as-applied challenge, the court determines whether the statute was enforced in an unconstitutional manner. *Society Ins.*, ¶27. The proper analysis depends on the issue. *In re Gwenevere T.*, 2011 WI 30, ¶49, 333 Wis.2d 273, 797 N.W.2d 854.

In this case, the circuit court's decision mirrored the balancing test of *Society Insurance* while considering the disparate treatment identified by *Ferdon*. The appellate majority left this holding undisturbed without comment, while the concurrence agreed. *Mayo*, ¶1 and ¶43 (Brash, J. concurring).

The lower courts clearly identified the disparate treatment the Fund contends is required. The circuit court correctly stated the test, citing *State ex rel. Watts v. Combined Cmty. Servs. Bd. of Milwaukee Cty*., 122 Wis.2d 65, 77, 362 N.W.2d 104 (1985) (fundamental determination is whether there is arbitrary discrimination in statute's application and whether a rational basis justifies difference in rights afforded) as well as that for due process challenges, citing *State v. Wood*, 2010 WI 17, ¶18, 323 Wis.2d 321, 780 N.W.2d 63

(court must identify protected constitutional interest and conditions under which competing state interests might outweigh it). (R191:15-16;P.App.058-059). It properly applied that law to the facts. (R191:15-21;P.App.158-064). *Mayo*, ¶¶43-45 (Brash, J. concurring). It found no rational basis for depriving Mrs. Mayo of the jury's award because doing so would not fulfill the cap's purpose. (Id.)

The circuit court concluded that Mrs. Mayo would be a "minimally," not adequately, compensated victim if the cap applied, while Mr. Mayo fell within a sub-classification as a spouse. (R191:17;P.App.060). Application of the cap would not fulfill the stated legislative goals, particularly because the award was commensurate with the injuries. (R.191:17-21;P.App.060-064). The Mayos' 95.46% reduction in damages would stand in "stark contrast" to the 41.4% reduction found unconstitutional in *Ferdon*, highlighting the unconstitutional disparity in treatment. (R191:20;P.App. 063).

The Fund's argument that the cap applies uniformly to all is wrong. Because the cap's application varies, creating the greatest reduction for those catastrophically injured while permitting those least injured to recover their entire award, creating a deprivation outweighing the public interest, both lower courts correctly found it unconstitutional as applied. *Mayo*, ¶¶43-45 (Brash, J. concurring).

Blake is different. Blake demonstrated no disparity, unlike the Mayos. Moreover, *Blake* considered a liberty interest but the Mayos' claim is qualitatively different. As

"proper claimants," they have a constitutionally-protected property interest in the Fund. In addition, the Fund misunderstands the "proof beyond a reasonable doubt" required to sustain a constitutional challenge. It is not an evidentiary standard. *Appling*, 358 Wis.2d 132, ¶18.[14]

Its contention that the cap was designed to render "the most speculative" item of damages the same in every case fails because they are not the same in every case. The cap only applies if victims' noneconomic damages exceed it. Moreover, its contention that all noneconomic damages are "speculative" is an invidious attack on both the courts and jury systems. This court has declared such injuries compensable and set forth parameters for recovery. See, The Law of Damages in Wisconsin, §5.7 *et. seq.* (Russell M. Ware ed., 7th ed. 2017). Juries are instructed to award them only if plaintiffs met their burden of proof. Wis.Civ.J.I. 202. The Fund's evident disdain for these damages and the juries which award them should not be rewarded.

Its contention that such damages are unpredictable must be rejected for the reasons discussed above (p. 27-28, supra). The Fund's lament that affirmance will result in "no predictability whatsoever for noneconomic damages" (Brief at 42), fails for the same reasons.

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[14] The Fund's admission that the Mayos' award (which it admits was commensurate with their injuries) was "one of the most significant" against (Brief at 40), further demonstrates that its fear of "mega-awards" is not actuated by reason.

Its prediction that affirmance will raise premiums and assessments is illogical given that the Mayos' award could be paid with the Fund's investment income (R191:18;P.App.061; P.App.780), and rendered even more so by considering the Fund's inability to reduce its surplus and history of much-decreased claims. The Fund's arguments regarding affirmance's impact on physician retention and defensive medicine are equally irrational, as discussed above. *Mayo*, ¶¶43-45 (Brash, J. concurring).

The Fund misstates the lower courts' analysis, claiming they declared the cap unconstitutional as applied because its result was "harsh." (Brief at 43). Its attempt to liken these facts to *Blake* fail because here, not only was Mrs. Mayo treated differently than those injured less severely, the statutory change worked a "substantial impairment" of a property interest which outweighed the public interest, rendering the statute is unconstitutional as applied. *Society Insurance*, ¶37.

Sambs is inapposite; the Mayos' claims are not a creation of the legislature.

The Fund argues that numerous other courts have declared caps constitutional. Other courts have reached a contrary result.[15] Constitutionality is not governed by the weight of authority but by application of Wisconsin precedent. Wisconsin precedent requires affirmance.

[15] See, e.g., *McCall*, *Best*, and *Arneson*, supra.

Substantive due process "protects against governmental action that either 'shocks the conscience ... or interferes with rights implicit in the concept of ordered liberty.'" *Blake*, 370 Wis.2d 1, ¶47, quoting *Dane Cty. DHS v. P.P.*, 2005 WI 32, ¶19, 279 Wis.2d 169, 694 N.W.2d 344. It shocked the conscience of the lower courts to deprive the Mayos of over 95% of a noneconomic damages award neither excessive nor unpredictable while the Fund holds a nearly $1 billion *surplus,* which continues to grow despite efforts to tame it. *Mayo*, ¶¶43-45 (Brash, J. concurring). This court should affirm their correct analysis.

VI. *FERDON* PROPERLY STATES WISCONSIN LAW.

The Fund's argument that, because the $750,000 cap exceeds the high average of tried noneconomic claims cited in *Ferdon*, ¶118, it met *Ferdon's* criteria, is disingenuous. *Ferdon* was quoting a 1986 article. Adjusted for inflation, that average exceeded $1.2 million by 2005 and $1.6 million now.[16] Premising the amount of a cap applying to future litigation on 20-year-old statistics without adjusting for inflation is patently irrational.

The Fund next argues that $750,000 was not "plucked out of thin air," contending that the legislature divined a sum that was just right. (Brief at 47). But the legislature's "explanation," quoted by the Fund, explains nothing. Neither does the legislative history. See, *Mayo*, ¶26-27. Just as in

[16] See http://www.calculator.net/inflation-calculator.html

Funk, the legislative conclusions attempted to explain what was not reasonable, while failing to meaningfully address infirmities. 148 Wis.2d at 67. Like *Funk*, this court should declare the legislature's second attempt constitutionally unsound.

The Fund's invitation to overrule *Ferdon* should be rejected. Its contention that *Ferdon* created an "unsound" "new" test, "rational-basis-with-teeth," is unsustainable. *Ferdon* followed Wisconsin law, particularly *Martin v. Richards*, 192 Wis.2d 156, 531 N.W.2d 70 (1997). The lower courts did not understand it to require heightened scrutiny; they expressly rejected that contention. Mayo, ¶12, n.2. Nor has this court expressed any difficulty when applying *Ferdon's* precepts. See, *Lands End v. City of Dodgeville*, 2016 WI 64, ¶99, 370 Wis.2d 500, 881 N.W.2d 702. The Fund's argument is meritless.

The Fund again fails to address contrary dispositive precedent. For example, *Funk* declared interpretation of a predecessor statute *stare decisis* as to analysis of its successor. And *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶¶43, 45, 281 Wis.2d 300, 697 N.W.2d 417, unequivocally declared *stare decisis* of fundamental importance to the rule of law, particularly where this court has interpreted a statute, requiring the party to demonstrate the decision was "objectively wrong" to warrant such relief. The Fund cannot demonstrate that *Ferdon* was "objectively

wrong" given its exhaustive citation to Wisconsin authority and the changes in condition showing *Ferdon* was correct.

Ferdon first reiterated the rules of legislative deference for which the Fund advocates. *Ferdon*, ¶¶67 et seq. It then declared the rational basis test "not toothless," *id*., ¶78, quoting *Doering*, 193 Wis.2d at 132, (quoting *Schweiker v. Wilson*, 450 U.S. 221, 243, (1981)). *Doering* was not the only case to so hold. See, *Ferdon*, ¶78, n. 90 (collecting cases).

Ferdon's formulation of the rational basis test is not qualitatively different than the Fund's. *Ferdon* explained it:

> requires the court to conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

Ferdon, ¶78, *quoting City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 478 (1985). The Fund's formulation is essentially the same. (Brief at 15-16).

Overruling *Ferdon* per the Fund's request would require overruling scores of other cases. Complaints that *Ferdon* obviates "reason and logic" as sufficient to sustain legislative enactments are meritless, particularly when *Funk's* analysis is considered.

Funk declared the construction statute of repose "an unusual statute" which "should be examined with care, albeit if only to determine that its classifications are rationally

related to a legitimate purpose." *Funk*, 148 Wis.2d at 71. *Funk* then rejected one legislative rationale as "a distinction … legally irrelevant … in the context of the statute." *Id*., at 74. It rejected another stating: "even were we to give credence to the 'control' rationale, the legislature did not apply it with consistency." *Id*., at 76. *Ferdon's* consideration of the statute's "basis in reality" gave the legislature much more deference.

Ferdon's review of literature is no different than the evidence this court considered in *Funk, Milwaukee Brewers, Society Insurance,* and *Blake,* 370 Wis.2d 1, ¶¶11 n.10, 42.

The Fund's complaint that *Ferdon* constitutes a sea change in constitutional law requiring proof a law actually works and rejecting hunches as a basis for legislation is overblown. It casts cherry-picked passages as radical departures from prior law, while ignoring that *Martin, Funk* and *Milwaukee Brewers,* among others, applied a similar analysis using the same test. Further, one cannot rationally contend that illogical behavior, hunches, and incorrect statements of law are rational bases for legislation.

The Fund's contention that *Ferdon* created a fairness test for rational basis review is similarly unsustainable. Like *Mayo, Ferdon* considered whether a rational basis existed for the classifications created by the legislature and concluded it did not. Time has demonstrated that *Ferdon* was correct. Nothing demonstrates that more clearly than the Legislative Audit Bureau's switch in focus. If the cap was required to

preserve the Fund, the Audit Bureau would still be focusing on its viability, not reduction of its surplus.

The Fund's castigation of *Ferdon's* reasoning as "unsound" is unsustainable, given *Martin*, as well as *Doering*, *Funk* and *Milwaukee Brewers*, among others, applying essentially the same analysis. No authority supports the Fund's contention that failure "to produce a body of settled law" is grounds for overruling a case. *Romanshek* requires far more. The Fund's unfounded argument must be rejected.

CONCLUSION

The appellate court correctly concluded that the cap is unconstitutional, facially and as-applied, because it bears no rational relationship to the stated legislative goals. Neither a "crisis" nor a threat to the Fund's viability exists. Ascaris and Antonio Mayo respectfully request that this court affirm the appellate court's correct decision.

Dated this 2nd day of January, 2018.

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I hereby certify that:

This brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and separate appendix produced with a proportional font. The length of this brief is 10,956 words.

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12) and (13). The text of the electronic brief is identical to the printed form of the brief filed as of this date. The content of the electronic appendix is identical to the printed form of the appendix filed as of this date.

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I hereby certify that filed with this brief a separate appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;

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Dated this 2nd day of January, 2018.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on January 2, 2018, this brief and separate appendix were delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I further certify that the brief was correctly addressed.

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